

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.468 of 1987

Harunkhan Burhankhan Pathan
Since deceased by his legal heirs
Basir Harunkhan Pathan & ors. Appellants

Vs.

Abdul Rahim Sk. Abdul Rajak Mukadam
and ors. Respondents

Mr.D.K.Ghaisas for appellants.
Mr.S.M.Kazi for resp.no.1.
Other respondents served.

CORAM: B.H.MARLAPALLE, J.

June 12, 2007.

ORAL JUDGMENT:

1. This second appeal arises from the judgment and decree passed by the learned Joint Civil Judge, Junior Division, Ratnagiri on 25th July 1983 in Regular Civil Suit No.88 of 1979 and confirmed in Civil Appeal No.109 of 1983 by the learned District Judge at Ratnagiri vide his judgment and order dated 10th August 1987. The following two substantial questions of law have been framed by Mr.Ghaisas, the learned counsel for the appellant-defendant no.1:

(a) Whether the suit filed by the plaintiffs was within limitations? and

(b) Whether the defendant no.1 perfected his title on the suit property by adverse possession and more so when the Defendant No.1 paid the Devsthan charges as far back as in the year 1952 and in view of the order passed by the District Survey Office on 26/5/1965?

2. The present respondent nos.1 to 8 had filed Regular Civil Suit No.88 of 1979 for possession and compensation. The suit property described was the house bearing Municipal no. 498 located on Survey No.490 within the limits of village Vadgaon, Ratnagiri Municipality and open plot area admeasuring about 6 gunthas. The said property belonged to Shri Deo Vishweshwar Deosthan and the plaintiffs claimed that their forefathers as well as the forefathers of defendant nos.2 to 6 were the permanent tenants of the suit property. The plaintiffs had further stated that one of the predecessors of defendant nos.2 to 6 by name Shaikh Ahamed Shaikh Ismail Mukadam was employed in the District Court, Ratnagiri along with defendant no.1 and defendant no.1 was required to shift to a new house immediately. Under these circumstances to help a colleague, Shri Shaikh Ahmed

Shaikh Ismail Mukadam gave house no.498 in occupation of the defendant no.1 as a licensee but without any consideration. The defendant no.1 occupied the suit house for a long time and proceedings were taken out by the plaintiffs and defendant nos.2 to 6 against the defendant no.1 before the revenue authorities from time to time for eviction and for correction of title. The plaintiffs issued a notice dated 12/2/1979 (Exh.52) terminating the licence and demanding the possession of the house before 1/3/1979. The notice was received by the defendant no.1 on 14/2/1979 and he replied the same on 26/2/1979 (Exh.53). As the defendant no.1 did not vacate the suit house the plaintiffs filed RCS No.88 of 1979. In his Written Statement filed at Exhibit 25 the defendant no.1 opposed the suit mainly on two grounds. The first one was that the suit was beyond limitations and the second ground taken was that the defendant no.1 had purchased the suit house for a consideration of Rs.1000/- on 14/4/1952 from the predecessor of the plaintiffs and the defendant nos.2 to 6. An additional defence was also taken contending that the defendant no.1 was occupying the surrounding land and was cultivating the same and, therefore, he being a tenant within the meaning of

the Bombay Tenancy and Agricultural Lands Act, 1948 the suit filed by the plaintiffs could not be entertained. The defendant no.1 had also claimed that he was a permanent tenant of the suit house and he had directly paid the consideration to the Devsthan for a period of 10 years and his status as a tenant was accepted by the Devsthan. The plaintiff no.1 examined himself for the plaintiffs as well as defendant nos.2 to 6 and produced documentary evidence i.e. extract of the suit land and suit house as well as extracts of agreements at Exhibits 57 to 70. He also produced a copy of the notice (Exhibit 52), defendant no.1's reply (Exhibit 53), Record of Rights extract (Exhibit 55) and Extract of assessment (Exhibit 56). The depositions of Defendant No.1 were recorded through the Commissioner at Exhibit 108. On behalf of the Defendant No.1 Shri Sayyad Abdul Kadri, Shriniwas Shiwaram Malekar and Kasam Adam Khan were also examined at Exhibits 113 to 115. The defendant no.1 also produced documentary evidence at Exhibits 38 and 93.

3. From the Record of Rights at Exhibit 55 it was clear that the suit property was owned by Shri Deo Vishweshwar Devasthan and the name of its Chairman

was shown as Kashinath Laxman Parulekar. Shaikh Umar Shaikh Ismail Mukadam, Shaikh Ahmad Shaikh Jafar Mukadam, Abidabi Jawajhi Shaikh and Shaikh Hasan Shaikh Abbas were shown as permanent tenants in the suit land. This extract was for the year 1977-78. This document went to show that the suit property was previously in possession of forefathers of the plaintiffs and defendant nos.2 to 6 as permanent tenants. In addition the plaintiffs also produced house extracts (Exh. 56) for the years 1976-77, 78-79. The suit house stood in the name of Shri Shaikh Mohammed Shaikh Ismail Mukadam as its owner. The defendant no.1 was not shown as licensee of the suit house in the municipal record.

4. In his depositions the defendant no.1 admitted that he was working with Shaikh Ahmed Shaikh Ismail Mukadam in the District Court at Ratnagiri and he also admitted that he entered into the suit house through him but stated that he had agreed to purchase the property and it was sold to him on 14/4/1952 for a consideration of Rs.1000/-. He also admitted that he was in possession of the suit house since 1930 but he could not produce a copy of any agreement supporting his contentions regarding the transfer of

the suit house to him by the predecessors of the plaintiffs as well as defendant nos.2 to 6. At Exhibit 33/6 he produced an alleged agreement copy for a total consideration of Rs.1000/- but could not prove the contents therein and, therefore, it was not exhibited. He examined one witness i.e. Sayad Abdul Kadir to prove the said document i.e. agreement dated 17/4/1952 and it was revealed before the trial Court that the said witness had not signed the agreement in any capacity.

5. The trial Court on assessment of the evidence

adduced by both the parties and on the basis of the arguments advanced before it, held that the plaintiffs and defendant nos.2 to 6 had proved their title to the suit house and defendant no.1 could not prove that he had acquired title to the suit property by continuous adverse possession for more than twelve years prior to the date of filing of the suit. It further held that the suit was not barred by non-joinder of necessary parties and the issue of limitations did not survive. The lower Appellate Court on reappreciation of the evidence adduced before the trial Court held that the trial Court had rightly decreed the suit of the plaintiffs and the

plaintiffs were entitled to possession of the suit property. The claim of the defendant no.1 that he had become owner of the suit property by adverse possession and that he had been put in possession of the suit property by part performance of the contract were held against him. The lower appellate Court observed that the defendant no.1 had taken multiple defences regarding his title to the suit property and the same is obvious from the Written Statement filed by him at Exhibit 25. Firstly he contended that he is a permanent tenant under the Rent Act. Secondly he contended that he was in possession of the suit premises by way of part performance under Section 53-A of the Transfer of Property Act and thirdly he had contended that he is a permanent tenant of the land and, therefore, protected under the Bombay Tenancy Act and lastly he contended that he had perfected his title by way of adverse possession. Coming to the issue of adverse possession it has come on record that the possession of the defendant no.1 over the suit house was not adverse to the plaintiffs and defendant nos.2 to 6 at any point of time and either some of them or all of them had filed proceedings before the revenue authorities and succeeded against the defendant no.1 all along. They

had not kept quiet and had initiated proceedings against the defendant no.1 on more than one occasions. It would also be pertinent to refer to the order passed by District Survey Office at Exhibit 78 on 26/5/1965. In the said order it is clearly stated that the plaintiffs and defendant nos.2 to 6 were the permanent lessees and the defendant no.1 was entered as Vahivatdar in the other rights column as he had got his vahivat over it for the last more than 12 years. The said order also held that the pucca cattle shed admeasuring 16 ft. x 17.6 ft. and constructed by the defendant no.1 was unauthorised. As per the said order ownership of the suit property was with Shri Vishweshwar Devasthan and the name of Smt. Fatimabi wife of Sayed Ahmad was directed to be entered as permanent tenant in respect of land in Ch.No.26 and owner of the house in Ch.No.24A. She was also directed to be entered as the holder of Ch.No.28B. This order further reconfirmed the contentions of the plaintiffs and defendant nos.2 to 6 that the defendant no.1 had a limited title of the vahiwatdar as he was in possession of the suit house. The issue of adverse possession has, therefore, been rightly held against the defendant no.1 by both the Courts below.

6. On the issue of limitations, as referred earlier the plaintiffs had issued notice dated 12/2/1979 (Exh.52) and the same was replied to by the defendant no.1 on 26/2/1979 (Exh.53). The cause of action shown in the said notice referred to some of the steps / actions allegedly taken by the Defendant No.1 to enter his name in the Record of Rights as the permanent tenant in respect of the suit house inspite of the order dated 26/5/1965 passed by the District Survey Office clarifying his status vis-a-vis the suit property. It is interesting to note that in his Written Statement or in his depositions before the trial Court the defendant no.1 did not elaborate as to how the suit was filed beyond limitations. As noted earlier in his Written Statement, he has claimed his title to the suit property in more than one forms viz. a permanent tenant, owner by adverse possession, in possession of the suit property by way of part performance of contract (agreement for sale) and a protected tenant under the Bombay Tenancy Act. The plaintiffs in the suit as well as in the legal notice had clarified the cause of action to seek the eviction of defendant no.1 from the suit house and if regards be had to these averments which were not

disputed by bringing evidence on record, it could not be held that the suit filed by the plaintiffs was hit by limitations. The concurrent findings recorded by both the Courts below against the title of the defendant no.1 do not suffer from any error apparent on the face of record and the reasoning given by the Courts below in support of the decree are supported by the evidence, oral and documentary. Both the substantial questions of law as framed hereinabove are answered against the appellant - defendant no.1.

7. In the premises this appeal fails and the same is hereby dismissed with costs.

(B.H.MARL